85-1531

Supreme Court, U.S.
FILED
FEB 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

MARCUS GUMZ,

Petitioner,

v.

DOUGLAS MORRISSETTE & LAWRENCE CLOUTIER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM H. LYNCH
625 N. Milwaukee St.
Suite 404
Milwaukee, WI 53202
(414) 289-9200

Counsel for Petitioner

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in holding that there was no violation of constitutional magnitude of rights secured by the Fourteenth Amendment where (1) state officials maliciously planned and caused the use of excessive force in executing an arrest, (2) state officials orchestrated a needlessly dramatic and coercive draconian operation which utilized too many bodies and too many guns and which was grossly disproportionate to the need to secure payment of a $100 civil penalty and to terminate further civil violations, (3) state officials knew that the operation would surprise, frighten, upset and anger the person arrested, and (4) the operation caused the person arrested to suffer emotional distress at the time and in the immediate aftermath deter-

mined by a jury to merit $50,000 in compensatory damages and $15,000 in medical expenses, the court having determined that the injury suffered was not sufficiently "severe" as a matter of law.

2. Did the court below err in holding that the intentional seizure of petitioner's two ton dragline from his farm by state officials, which sezure was not authorized by state statute or other law, did not constitute a deprivation of property without due process of law in light of Hudson v. Palmer, 468 U.S. ___, 104 S. Ct. 3194, 82 L. Ed.2d 393 (1984), where the operation to seize the property required substantial equipment and manpower and was planned in advance and cleared in advance by the highest authority of the state agency whose officers seized the property.

LIST OF ALL PARTIES TO THE PROCEEDING BELOW

The caption of the case in this court contains the names of all parties.

TABLE OF CONTENTS

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW	i
LIST OF ALL PARTIES TO THE PROCEEDING BELOW	iii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iii
REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW	v
JURISDICTION	v
CONSTITUTIONAL PROVISIONS AND STATUTES	vi
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	18
CONCLUSION	47
APPENDIX	48

TABLE OF AUTHORITIES

Baker v. McCollan, 433 U.S. 137 (1979)	39,40

Cerbone v. Conway, U.S. Supreme Court No. 84-1947, cert granted, Jan. 27, 1986, 54 U.S.L.W. 3492 — 18

Conway v. Village of Mount Kisco, 750 F.2d 205 (2nd Cir. 1984) (Conway I) — 18,19, 21

Conway v. Village of Mount Kisco, 758 F.2d 46 (2nd Cir. 1985) (Conway II) — 18,19, 21

Daniels v. Williams, ___ U.S. ___, 54 U.S.L.W. 4090 (Jan. 21, 1986) — 23

Davidson v. Cannon, ___ U.S. ___, 54 U.S.L.W. 4095 (Jan. 21, 1986) — 24,25

Davis v. Murphy, 559 F.2d 1098 (7th Cir. 1977) — 38

Gilmere v. City of Atlanta, 774 F.2d 1495 (11th Cir. 1985) — 36,41

Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980) — 30,31

Hudson v. Palmer, 468 U.S. ___, 104 S.Ct. 3194, 82 L.Ed. 393 (1984) — 15,16, 17,42

Parratt v. Taylor, 451 U.S. 527 (1981) — 16,45

Sampson v. Gilmere, U.S. Supreme Court No. 85-1186, 54 U.S.L.W. 3520 — 36

Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981) — 33,34

Wilson v. Garcia, ___ U.S. ___, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) 41

Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981) 35

OTHER AUTHORITIES:

Wis. Stat. §30.20 (1979) 2

42 U.S.C. §1983 7,12,15,30

28 U.S.C. §1331 and 1343 7

REPORTS OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Seventh Circuit below is Gumz v. Morrissette, 772 F.2d 1395 (7th Cir. 1985).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was rendered on September 5, 1985. A Petition for Rehearing in the Court of Appeals was filed on September 18, 1985, and was

denied on September 27, 1985. On December 26, 1985, Mr. Justice Stevens signed an order extending the time for filing this petition for certiorari to and including February 24, 1986. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment, United States Constitution:

> Sec. 1. ...Nor shall any State deprive any person of life, liberty, or property, without due process of law....

United States Code, 42 U.S.C. §1983:

> Every person who, under color of any

> statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF THE CASE

Petitioner Marcus Gumz is a "muck farmer" who lives near Baraboo, WI. He raises mint and other crops on land that would revert to ponds and marshes if drainage is not maintained. The maintenance of drainage systems, including a main drainage ditch known as a leech waterway, requires removal of run-off or "muck". Gumz utilized a "dragline" which is a two-ton apparatus consisting of a steam shovel and a 50-foot boom to scoop muck out of the waterway. The Wisconsin Dept. of

Natural Resources, (DNR), considers the leech waterway a navigable body subject to its regulation.

On October 28, 1980, a DNR warden issued a citation to an employee of Marcus Gumz, Groehler, who operated the dragline for dredging the leech waterway without a permit in violation of Wis. Stat. §30.20 (1979). The DNR warden, Warden Jameson, later issued a citation and mailed it by certified mail to Gumz. Gumz never received the citation. The certified letter was returned undelivered. Jameson and the district attorney of Sauk County knew that Gumz had not received the citation by certified mail. The district attorney's office issued an arrest warrant and complaint dated February 19, 1981, against Gumz for failure to answer the October 28, 1980, citation in court.

On and before March 3, 1981, plans

were formulated to enter on Marcus Gumz's property and execute the arrest warrant and seize Gumz's dragline. Among those involved in the planning were the respondents to this petition, Douglas Morrissette and Lawrence Cloutier. Morrissette was a district director for the DNR and Cloutier's superior. Cloutier was a "warden supervisor". Eight DNR wardens, a DNR warden supervisor, Cloutier, a DNR district director, Morrissette, a DNR equipment operator, and a sheriff's deputy were involved in the execution of the arrest warrant and seizure of the dragline. Arrangements were made to obtain the use of a lowboy trailer upon which to haul the dragline. A permit for using an oversized trailer was obtained. The dragline was to be confiscated because of the violations that it had been involved with and as evidence.

Respondent Morrissette prior to March 3 made arrangements with and notified the DNR central office, including George Meyer, DNR's Law Enforcement Bureau Director, and the Secretary of the Dept. of Natural Resources, Mr. Besnady, of the proposed operation.

The citation for dredging without a permit sought a forfeiture of $100.

The force of eleven DNR personnel were all armed with pistols. Some were armed with shotguns, a 30.06 scoped rifle, and a mini-14 semi-automatic rifle.

On March 3, 1981, prior to executing the plan, district director Morrissette telephoned an Assistant Attorney General, Maryanne Sumiy, and informed her of the situation and the DNR's proposed course of action.

Despite previous disagreements between Gumz and DNR employees, no incidents prior to March 3, 1981, provoked

physical violence from Gumz or threats of physical violence.

Initially four men went on the Gumz property in two cars. District Director Morrissette and a warden went to the house to serve the warrant. Gumz did not answer the door. Warden supervisor Cloutier and another warden who was armed with a scoped rifle went to the dragline down by the ditch and arrested two of Gumz's employees.

When Gumz first saw armed men on his land, he became frightened and commenced a series of telephone calls to the newspaper, the Governor's office, the sheriff, DNR headquarters, and his attorney.

Gumz exited his house, and drove to where the vehicle in which district director Morrissette had arrived was located and ordered it off his farm. Allegedly Gumz was informed of the

warrant. An accident then ensued between Gumz's car and the DNR car. The DNR car blocked a single lane farmroad at a turn-around place. Gumz did not deliberately hit the DNR car. Gumz, frightened that the DNR agents would shoot him, backed his car into a field and around the DNR car and back toward his house to try to get back inside. Respondent Cloutier called six DNR reserves onto the Gumz property. They entered the property at high speeds and after a brief chase blocked the path of Gumz auto without contacting plaintiff or his vehicle. The DNR vehicles moved around Gumz's yard all at once, circling and blockading Gumz's car.

Gumz then left his car, put his hands up, and said, "Don't shoot me", as six wardens, all with weapons, converged on him. He was arrested, handcuffed,

patted down, and put in a DNR car. The dragline was seized and removed from the Gumz property.

Gumz was taken to the Sauk County Sheriff's Office where he was charged with violating the dredging law and with a felony charge of criminal damage to property. He posted $443 in bail and was released.

During his custody Gumz became ill. Almost immediately after his release he was hospitalized for an emergency operation to implant a pacemaker, which he subsequently underwent.

Plaintiff filed this action on January 24, 1983, in the United States District Court for the Western District of Wisconsin. The action brought arose inter alia under 42 U.S.C. §1983, and the trial court had jurisdiction of the action under 28 U.S.C. §§1331 and 1343.

United States District Court Judge,

James E. Doyle, granted defendants' motions to dismiss all of Gumz's claims asserted under sections of the civil rights act other than §1983 in an order dated August 3, 1984. Gumz did not appeal from that order. In that order, Judge Doyle also ruled that plaintiff's complaint did not adequately allege a violation of the Fourth Amendment so as to state a claim under §1983. Judge Doyle rejected Gumz's argument that the warrant for his arrest was invalid because it was issued by a court commissioner rather than a judge in violation of state law. Gumz had argued that the DNR officials who obtained the warrant knew that Gumz had not received the dredging citation but did not inform the court commissioner of this fact. Had they done so Gumz argued that under Wisconsin law only a judge could issue a warrant. This issue of misrepresen-

tation by the DNR officials who applied for the warrant, was not appealed to the Court of Appeals.

Also prior to trial all of Gumz's pendant state tort law claims for assault and battery, false arrest, false imprisonment, intentional and negligent infliction of mental distress, abuse of process and negligence were dismissed because of failure to comply with the Wisconsin statute requiring notice of claim to the state. Gumz did not appeal from this ruling of Judge Doyle.

The jury returned a verdict in favor of Marcus Gumz against defendants Morrissette and Cloutier finding that they had caused "the use of excessive force in the arrest of plaintiff on March 3, 1981". The jury also found that Cloutier had maliciously caused the use of such force. The jury found that Cloutier maliciously seized the dragline

on March 3 and that Morrissette seized the dragline without a good faith belief that it was constitutional to do so. The jury also found that by causing the seizure Cloutier caused Gumz to suffer emotional distress on 3/3/81 and in the immediate aftermath.

The jury awarded $50,000 in compensatory damages and medical expenses of $15,000 against both defendants. The jury awarded $10,000 in punitive damages against defendant Cloutier. The jury specifically refused to find that the use of force caused Gumz to suffer either a "heart problem" or a "persisting change in personality". Therefore, the jury's damage awards were solely for "emotional distress on March 3, 1981, and in the immediate aftermath".

The defendants filed post verdict motions. All of defendants' post verdict motions were denied by Judge

Doyle. Judge Doyle ruled that the sum of $10,000 was clearly not excessive as a punitive measure for malicious violation of a constitutional right. (App. p. 29). Judge Doyle also refused to modify or reduce the award of $50,000 in compensatory damages for emotional distress. (App. p. 29-30) Although he stated that the amount was "questionable" he concluded the following:

> However, there was considerable evidence from which the jury could reasonably have found that for this particular plaintiff, the emotional distress, even though brief, was unusually intense and severe.

(App. p. 29) Judge Doyle also upheld the sufficiency of the evidence for the jury to conclude that Cloutier acted with malice. (App. p. 30)

The Court of Appeals reversed the trial court's judgment with respect to the excessive force claim and directed the trial court to enter judgment for

the defendants on that claim. The Court of Appeals also affirmed the district court's judgment to the extent that it did not allow compensation to the plaintiff under §1983 for the seizure of the dragline. (App. p. 16) In an opinion written by Chief Judge Cummings and joined in by Judge Eugene A. Wright, the court recognized Gumz's claim for excessive use of force as a substantive due process claim. The court adopted the following standard:

> ...[T]he use of force by a state officer is unconstitutional if it 1) caused severe injuries, 2) was grossly disproportionate to the need for action under the circumstances, and 3) was inspired by malice rather than merely careless or unwise excess of zeal so it amounted to an abuse of official power that shocks the conscience.

(App. p. 9) The court concluded that it would not be proper to reverse the district court's judgment on the basis of either the second or third criterion

of its three-part test. (App. p. 10) With respect to the issues of disproportionality and malice, the court found as follows:

> Since there is sufficient evidence to support the jury's finding that Cloutier maliciously caused the use of excessive force, and in view of the fact that the draconian operation of March 3, 1981, was orchestrated to secure payment of a $100 civil penalty and terminate further civil violations, it would not be proper for this Court to reverse the district court's judgment on the basis of either the second or third criterion of the three-part test.

(App. p. 9-10) With respect to the issue of severity of the injuries caused the court concluded, however, the following:

> A review of the court's holdings and the jury's findings with respect to the injuries sustained by Gumz as a result of the March 3 incident, however, forces us to conclude that this case does not involve the type of severe harm redressible under §1983.

(App. p. 10)

The Court of Appeals also stated the

following with respect to this case:

> The situation before us viewed in its worse [sic] light can be summarized as follows:
>
> Two state officials implemented an operation to enforce a civil statute that utilized too many bodies and too many guns and those officials maliciously planned the needlessly dramatic and coercive operation knowing it would surprise, frighten, upset and anger the plaintiff.

(App. p. 10)

The Court of Appeals considered the demonstration of manpower and firepower as grossly excessive. The court stated "Thus the only force involved here was the grossly excessive demonstration of manpower and firepower." (App. p. 11) The court also concluded that the only harm done was emotional distress. The court stated:

> The only resulting injury or harm was the understandable emotional distress suffered by the unsuspecting and unwary target of the display.

(App. p. 11) The court concluded the

following:

> Although defendants here must have known that their operation would upset and anger the plaintiff, the facts of this case as determined by the judge and jury do not implicate the type of "brutal and demeaning" attack on the psyche of Marcus Gumz which would be actionable under §1983. [fn omitted]

(App. p. 12)

With respect to Gumz's claim that he should obtain compensatory damages for the emotional distress caused by seizure of the dragline, the Court of Appeals decided to affirm the district court's refusal to allow Gumz compensation for the seizure under §1983 "since under Hudson v. Palmer, 468 U.S. ___, 104 S. Ct. 3194, 82 L.Ed. [sic] 393, it is clear that the seizure was not a deprivation of property without due process of law." (App. p. 13)

The Court of Appeals determined that the deprivation of property in this case involved a special kind of taking by the

state, expressly considered by the Supreme Court in Parratt v. Taylor, 451 U.S. 527, where the loss of property "is occasioned by a random, unauthorized act by a state employee, rather than by an established state procedure. Hudson, 468 U.S. at ___, 104 S.Ct. at 3203, 82 L.Ed. [sic] at 406. (App. p. 15). The Court also stated the following:

> In such circumstances, where the state cannot predict or realistically prevent the deprivation of property, Parratt ruled that the Fourteenth Amendment is not violated if the state provides a meaningful post-deprivation remedy.

(App. p. 15)

Gumz petitioned the panel of the Court of Appeals for rehearing. He challenged the Court of Appeals' statement "It is also clear that the deprivation was the result of a random and unauthorized act of a state official." (App. p. 15) He asserted that the hauling away of the dragline was not a "random and

unauthorized act". He brought to the panel's attention numerous evidence from the record demonstrating that prior planning for the intentional seizure was both necessary and engaged in. He also set forth portions of the record demonstrating that the Wisconsin attorney general's office, the DNR central office, and the DNR Secretary Besnady were notified of the operation to seize the dragline in advance of its seizure. He asserted that Parratt and Hudson were not controlling because, in the present case, it would not have been difficult or burdensome for the state officials involved to include pre-deprivation processing prior to any seizure of the dragline. He also asserted that the taking here was not random and unauthorized but was planned and pre-arranged. Marcus Gumz's petition for rehearing was denied on September 27, 1985.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the Seventh Circuit in this case is in conflict with the decision of the Court of Appeals for the Second Circuit in Conway v. Village of Mount Kisco, 750 F.2d 205 (1984) (Conway I) and the second ruling in the same case, 758 F.2d 46 (1985) (Conway II). This Court has granted a petition for writ of certiorari to review both of the Conway decisions. Cerbone v. Conway, No. 84-1947, Cert. granted, January 27, 1986. 54 U.S.L.W. 3492. At issue in the Conway cases is the sufficiency of allegations of malicious prosecution to state a cause of action under 42 U.S.C. §1983 based on violation of the Due Process Clause of the Fourteenth Amendment. In Conway II the Second Circuit asserted that the claim was of constitutional magnitude because it

alleges "great humiliation, ridicule, and mental anguish". Conway II, supra, 758 F.2d at 48. Nothing of the facts in the Conway case as revealed in the two Court of Appeals opinions demonstrates that any physical injury was suffered by the plaintiff in that action. Nonetheless the Second Circuit recognized Conway's claim as one of constitutional magnitude on an implicit theory of violation of substantive due process.

The Court of Appeals for the Seventh Circuit in this case, however, has required as an essential element of a substantive due process claim proof of severe injury. Although the Court of Appeals in its opinion states that it is not holding "that some type of bodily injury is an absolute requirement to §1983 liability based on an excessive force claim," (App. p. 12), the court stated the following:

> Where the undue force underlying an excessive force claim primarily consists of an abstract demonstration of force and not its actual use, a justified finding of liability under §1983 would be most unusual.

(App. p. 11)

In applying its standards to the facts in this case, the Seventh Circuit held that emotional distress injury, in the absence of physical injuries, absent extraordinary circumstances is insufficient to constitute a constitutional violation as a matter of law. This holding is in direct conflict with the Second Circuit's response in Conway to the defendant's argument that the deprivation Conway alleged lacks constitutional magnitude. The Second Circuit stated the following:

> The point is weak. Conway's complaint alleges that seven hours of detention and "great humiliation, ridicule, and mental anguish" resulted from Cerbone's conspiracy with the Village, Bano Buick, and the Martabonos to execute the arrest

> warrant. Complaint at §§14-15. Those allegations are quite sufficient to constitute a constitutional deprivation of liberty actionable under §1983.

Conway II, supra, 758 F.2d at 48.

This court included among the questions presented for review in granting the petition for certiorari in the Conway cases the following question:

> Did court below err in holding that malicious prosecution claim is of constitutional magnitude because it alleges "great humiliation, ridicule, and mental anguish" and arrest under warrant that court elsewhere held time-barred, contrary to Paul v. Davis, 424 U.S. 693 (1976)? 54 U.S.L.W. 3493.

It should also be noted that the second question presented for review in this case is related to the third question presented for review in Conway. Both this case and the Conway case present issues of the interpretation of the applicability of Hudson v. Palmer under circumstances where assertions are made that the acts

complained of were random, unauthorized, and tortious under state law. In Conway, the petitioners ask this Court to reverse the Court of Appeals for failure to apply Hudson v. Palmer and related cases as a grounds for dismissing the claim. In this case petitioner seeks review of an asserted over extension and misinterpretation of the scope of Hudson v. Palmer by the Seventh Circuit.

Because this case has been tried and the facts have been more conclusively determined, in contrast to the Conway case which arises in the context of the Second Circuit reversing the trial court's motion to dismiss Conway's complaint, consideration of this case by the United States Supreme Court will provide the court with a more firm basis upon which to develop the contours of substantive due process claims.

This court, subsequent to the decision of the Court of Appeals in this case, has reiterated the substantive aspect of the Due Process Clause. In Daniels v. Williams, ___ U.S. ___, 54 U.S.L.W. 4090 (Jan. 21, 1986) in the opinion of the court by Mr. Justice Rehnquist this court explained the scope of the Fourteenth Amendment's Due Process Clause as follows:

> By requiring the Government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions. And by barring certain government actions regardless of the fairness of the procedures used to implement them, e.g. Rochin, supra, it serves to prevent governmental power from being "used for purposes of oppression." [citation omitted]

Id, 54 U.S.L.W. at 4091. Similarly, in his concurring opinion, Mr. Justice Stevens stated the following:

> Second, it contains a substantive component, sometimes referred to as "substantive due process," which

> bars certain arbitrary government action "regardless of the fairness of the procedures used to implement them."

Id, 54 U.S.L.W. at 4093. See also Davidson v. Cannon, ___ U.S. ___, 54 U.S.L.W. 4095, 4096 (Jan. 21, 1986) where the court noted that the defendants were "far from abusing governmental power, or employing it as an instrument of oppression" in reaching the court's conclusion that the negligent failure of prison officials to protect Davidson from another inmate did not deprive Davidson of a protected interest. In that case this court stated the following:

> Petitioner's claim, based on respondent's negligence, is quite different from one involving injuries caused by an unjustified attack by prison guards themselves, see Johnson v. Glick, 481 F.2d 1028 (CA 2), (Friendly, J.) cert. denied sub. nom., John v. Johnson, 414 U.S. 1033 (1973), or by another prisoner where officials simply stood by and permitted the attack to proceed, see Curtis v. Everette, 489

> F.2d 516 (CA 3 1973), cert. denied sub. nom., Smith v. Curtis, 416 U.S. 995 (1974).

Id., 54 U.S.L.W. at 4096. Similarly, the dissenting opinion of Justices Blackmun and Marshall in Davidson includes the following:

> A deprivation must contain some element of abuse of governmental power, for the "touchdown of due process is protection of the individual against arbitrary action of government, Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

Id., 54 U.S.L.W. at 4097.

This court's holding in Davidson demonstrates that seriousness of injury is not the issue which is central to determination of whether a violation of the Due Process Clause has occurred. The central consideration is whether or not there has been an abuse of governmental power or governmental power has been employed as an instrument of oppression.

The Court of Appeals for the Seventh

Circuit in this case decided a federal question, that is the scope of the protection of the Due Process Clause of the Fourteenth Amendment, in a way in conflict with the applicable decisions of this Court (see Rule 17.1(c) of the United States Supreme Court). The Court of Appeals recognized that the state officials engaged in conduct which might properly be described as "abusive government conduct". The court recognized facts that can only be interpreted as demonstrating that the governmental officials employed their power as an instrument of oppression. The court found that the action taken against Marcus Gumz was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excess of zeal when it expressly ruled that the second and third criteria

of the three-part test it established were met. The court, however, treated as a separate and distinct requirement proof of severe injury. By elevating the requirement of "severe injury" from the status of being only one factor to be considered in determining whether there has been an abuse of governmental power or government power has been employed as an instrument of oppression, to the status of a sina qua nom requirement for determining that the Due Process Clause has been violated, the Court of Appeals decided this case in conflict with this court's opinion in Davidson.

Furthermore, in addition to the conflict with the decision of the Second Circuit in Conway, the decision of the Court of Appeals in this case is in conflict with decisions of the courts of appeals of other circuits with respect

to the adoption of standards to be applied to the evaluation of substantive due process claims. Although the Court of Appeals for the Seventh Circuit in its opinion claims that it is adopting the same standard as that utilized by three of the Court's sister Circuits, the standard in fact adopted by the Seventh Circuit differs materially from the standards of the Tenth, Fifth and Fourth Circuits. Thus in its opinion the Seventh Circuit stated the following:

> According to this standard the use of force by a state officer is unconstitutional if it 1) caused severe injuries, 2) was grossly disproportionate to the need for action under the circumstances, and 3) was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience.

(App. p. 9). The Court treated the three matters as separate criteria each of which must be satisfied in order to

prevail. The other circuit courts have treated the issues of severity of injury, disproportionality, and presence or absence of malice as factors which should be weighed together to determine whether or not a constitutional violation has occurred. The courts have not treated the three matters in isolation from each other. The consequence of the more stringent standard adopted by the Seventh Circuit is to deny constitutional protection under circumstances where the government's official conduct is grossly disproportionate and inspired by malice, and therefore abusive government conduct, employed as an instrument of oppression, solely because the court determines that the injury, although substantial, is not sufficiently severe.

In none of the three cases cited by the Court of Appeals in support of its

assertion that three sister circuits have adopted the same standard was a determination made that failure to prove that the injury resulting from government conduct was sufficiently severe, taken by itself, meant that no denial of Due Process of Law had occurred.

In Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980), the Court of Appeals for the Fourth Circuit reversed the decision of the trial court dismissing the substantive due process claims of a child and her parents alleging violation of the child's constitutional rights by the infliction of disciplinary corporal punishment. The court stated:

> For reasons that follow we conclude that there may be circumstances under which specific corporal punishment administered by state school officials gives rise to an independent federal cause of action to vindicate substantive due process rights under 42 U.S.C. §1983.

Id. at p. 611. The court remanded the

case for further proceedings because the court could not determine whether those circumstances existed in the instant case from a review of the pleadings. There were no specific detailed factual allegations for the court to review. Because the complaint alleged that the corporal punishment inflicted was not "reasonable", but "severe" (Id. at 610), the court's holding is not based in any way on any preceived inadequacy of proof of severity of injuries.

Given the procedural posture of the Hall case, the portions of the opinion dealing with the standard to be applied in determining whether corporal punishment under certain circumstances constitutes a violation of substantive due process rights is dictum not holding.

The court in Hall stated the following:

> As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force supplied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.

Id. at 613. Nothing in the opinion states or implies that each of the issues of severity of injury, disproportionality, and maliciousness must rise to a certain level before a finding of denial of liberty without due process of law can be made. In fact the opinion points to no aspect of the complaint alleging facts related to disproportionality of the punishment to the need presented. Nonetheless, the court reversed the dismissal of the complaint.

It should also be noted that the ruling of the Fourth Circuit in Hall was stated in terms of inquiry into school

corporal punishment cases. The concept of "liberty" in the context of compelled attendance at public school with the specially recognized need for discipline of students is substantially different from the concept of "liberty" in the context of freedom from the abuse of official power in the privacy of one's own property.

In Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981), the Court of Appeals for the Fifth Circuit reversed a trial court ruling that the blows inflicted by a police officer lacked the brutal force necessary to engender a constitutional deprivation. The Fifth Circuit found that the policeman's actions did constitute a legal violation of constitutional dimension. Id. at 265. The court stated the following:

> In determining whether the state officer has crossed the constitutional line that would make the

> physical abuse actionable under §1983, we must inquire into the amount of force used in relationship to the need presented, the extent of the injury inflicted and the motives of the state officer. If the state officer's action caused severe injuries, was grossly disproportionate to the need for action under the circumstances and was inspired by malice rather than merely careless or unwise excessive zeal so that it amounted to an abuse of official power that shocks the conscience, it should be redressed under §1983.

Id. at 265. Again, nothing in the Shillingford opinion indicates that the matters of severity of injury, disproportionality, and maliciousness are to be separately determined. The approach is to give consideration to each of these matters in attempting to reach a conclusion of whether or not there was an abuse of official power that shocks the conscience.

The court in Shillingford reversed the trial court and determined that the physical abuse in the case was

sufficiently severe. Reaching its conclusion the court noted the following:

> That the results of the attack on Shillingford's person were not crippling was merely fortuitous.

Id. at p. 266. Because Shillingford found there was a constitutional violation, its holding is of little value in determining the issue of whether or not there is a constitutional violation when the injury inflicted is less severe.

Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981) also does not hold that lack of proof of severe injuries, by itself, without consideration of any of the other factors, requires as a matter of law a determination that no constitutional violation of substantive due process rights has occurred. In Wise the court held that Wise had not even effectively demonstrated a simple common

law claim for assault, to say nothing of a claim of excessive force. Id. at 1335. Wise did not even file affidavits or make specific reference to testimony or other evidence to support his claim that he was assaulted by Bravo. Id. at 1333 n. 2.

The Court of Appeals in this case decided an important question of federal law which has not been, but should be, settled by this Court. The significance of the questions presented and the need for their resolution is reflected in this court's grant of the petition for certiorari in the Conway case, supra. Also a petition for a writ of certiorari is pending before this court in Sampson v. Gilmere, No. 85-1186. The petition is to review the ruling in Gilmere v. City of Atlanta, 774 F.2d 1495 (1985). Among the questions presented is the following:

> Does the use of deadly force by police officer acting in mistaken belief that suspect poses threat of serious physical harm, as matter of law, violate substantive due process rights and state federally cognizable claim pursuant to 42 U.S.C. §1983 regardless of procedural protections available under state law?

54 U.S.L.W. 3520. The petition was filed on January 10, 1986.

In Gilmere, supra, the en banc Eleventh Circuit Court of Appeals stated the following:

> In holding both officers liable for beating the decedent, the court found that the beating occurred "with little or no provocation" and that "the blows were not delivered in a good faith effort to control Patillo, but rather out of irritation at his initial resistance.... If supported by the record, these findings would suffice to make out a substantive due process violation under both Johnson and Rochin.

Id. at 1501. Subsequent acts by the officers resulted in Gilmere's death. Nothing in the opinion in Gilmere discloses what the extent of the

injuries were to Gilmere from the blows administered to him, as opposed to the damage resulting from the subsequent shooting of him.

In its opinion in this case the Court of Appeals stated the following:

> Plaintiff cites and this Court can discover no case allowing recovery for use of excessive force under §1983 where there was an absence of any kind of bodily or physical injury resulting from the use of force.

App. p. 11. The statement of facts in Davis v. Murphy, 559 F.2d 1098 (7th Cir. 1977), indicates that one of the plaintiffs in that case, Joyce Wesley, was lined against the wall with another of the plaintiffs with a cocked gun in their faces. One of the defendants, Dennis Murphy, a City of Milwaukee policeman, ripped out the entire front of Joyce Wesley's dress, partially bearing her breasts because he wanted to see their size. The facts recited

indicate no physical injuries to Joyce Wesley. Id. at 1100-1101. The Court of Appeals reversed the trial court and ruled that "plaintiffs have alleged and proved gross violations of the Bill of Rights as assimilated into the Fourteenth Amendment and of the procedural due process pregnant of the Fourteenth Amendment itself [citation omitted]...." Id. at 1102. Although the precise theories of the Seventh Circuit in Davis are not absolutely clear, the basis for the court's ruling was the use of excessive force by police officers in effecting an arrest.

This case is very different from the case of Baker v. McCollan, 433 U.S. 137 (1979) cited by the Court of Appeals. This is a case of preplanned, intentional official action. It is not a case of failure by governmental officials to institute adequate

procedures. Unlike Baker, there is no issue of causation. In Baker the prolonged detention at issue was caused by the police official's failure to institute adequate identification procedures. Id. at p. 142. In any event, this court in Baker assumed, arguendo, that "depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty ... without due process of law.'" Id. at 145. Thus, this court understood the determination of a constitutional violation to depend in part on the duration and circumstances of the detention, rather than on any consideration of seriousness of injury to the person.

In Baker, this court stated the following:

> Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.

Id. at 146. This does not mean, however, that conduct that constitutes a tort cannot also lead to liability for violation of rights protected by the Constitution. In Wilson v. Garcia, ___ U.S. ___, ___ 105 S. Ct. 1938, 1949, 85 L.Ed.2d 254 (1985) this court stated the following:

> Congress ... intended that the remedy provided in §1983 be independently enforcible whether or not it duplicates a parallel state remedy.

See also Gilmere v. City of Atlanta, GA, supra, 774 F.2d at 1498-1499.

Despite the lack of any serious injury to the person, Mr. Justice Blackmun, concurring, in Baker, supra, stated the following:

I do not understand the Court's

> opinion to speak to the possibility that Rochin might be applied to this type of case or otherwise to foreclose the possibility that a prisoner in respondent's predicament might prove a due process violation by a sheriff who deliberately and repeatedly refused to check the identity of a complaining prisoner against readily available mug shots and fingerprints. Such conduct would be far more "shocking" than anything that petitioner has done.

Id. at 148. Certainly the Baker case does not stand for the proposition that proof of serious injury to the person is required in order to prevail on a claim of denial of substantive due process rights.

The Court of Appeals in this case extended this Court's holding in Hudson v. Palmer, supra, and by doing so decided an important question of federal law which has not been, but should be, settled by this Court. In this case the Court of Appeals determined that the general rule of this court that "absent an 'extraordinary situation' a party

cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified" was not applicable to the facts in this case. The Court ruled that the deprivation of property in this case involves a special kind of taking by the state where the loss of property is "occasioned by a random, unauthorized act by a state employee, rather than by established state procedure." (App. p. 14-15). The Court cited Hudson, supra, as authority for its position. In this case, however, the deprivation of the two-ton dragline took place, and only could take place, after prior and extensive planning and preparation. Furthermore, the highest officials of the state agency and the state attorney general were informed in advance of the plan which included the seizure of the property. Despite the

fact that it is undisputed that the seizure was unauthorized by state law, the state agency determined that the procedure of seizure of the dragline was within the proper scope of the state's power. The Court of Appeals in this case extended Hudson to circumstances that Hudson was not designed to reach. The Court extended Hudson to acts which can not justifiably be characterized as unauthorized. It also extended Hudson to circumstances where a pre-deprivation procedure could have been and would have been effective. Because of prior planning for the seizure with notice to the highest levels of the state government, a pre-deprivation hearing and other procedural protections could have been afforded prior to the seizure. No emergency existed. If such deprivations of property are to be excluded from the scope of the protection of the Four-

teenth Amendment such an important question of federal law should be settled by the United States Supreme Court.

Furthermore, the seizure in this case occurred on the private property of Marcus Gumz. This case is in contrast to the circumstances in Hudson, supra, and in contrast to Parratt v. Taylor, 451 U.S. 527 (1981) where the seizures at issue were from persons who were prisoners and in accordance with this court's ruling in Parratt did not have a reasonable expectation of privacy enabling them to invoke the protections of the Fourteenth Amendment.

The Court of Appeals also determined that it was satisfied that meaningful post deprivation remedies to redress the taking of his property were provided to Marcus Gumz. (App. p. 15). Gumz, however, sought in his civil rights

action damages not only for the loss of the monetary value of the dragline, but also for the emotional distress which the jury determined was caused by the malicious seizure of the dragline by a state official. Nothing in the Court of Appeals' opinion indicates that Gumz had a remedy under state law for the emotional distress caused by such a malicious seizure of his property by state officials. Certainly an action for return of the property or for its recovery or for its monetary value (conversion) or for trespass to his personal property will not provide a remedy for the harm suffered by Marcus Gumz. His action was not limited to seeking return of his dragline or monetary damages for the economic loss to him resulting from its seizure. Gumz sought damages for the emotional distress resulting from the seizure of

his dragline in violation of his constitutional right not to be deprived of his property by state officials without due process of law. The Court of Appeals failed to consider Marcus Gumz's claim with respect to seizure of the dragline in its context. The seizure, as determined by the Court of Appeals, was part of the draconian operation which was maliciously planned by officials and was needlessly dramatic and coercive. By determining that remedies under state law were adequate, the Court of Appeals decided an important question of federal law which has not been, but should be, settled by this Court.

CONCLUSION

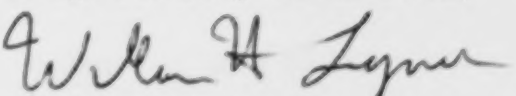
Marcus Gumz's petition for a writ of certiorari should be granted in order that this court may resolve the conflict of the decision of this case with

decisions of other federal courts of appeals and so that this Court may decide the important questions of federal law which are presented by this case which have not been, but should be, settled by this court.

APPENDIX

The opinion of the Court of Appeals for the Seventh Circuit and a portion of the opinion of the trial court denying defendants' motions for post conviction relief entered on November 26, 1984, are contained in an appendix to this petition which has been separately bound.

Respectfully submitted,



William H. Lynch
Attorney for Petitioner
& Cooperating Attorney
for Wisconsin Civil
Liberties Union Fdn.,
Inc.

P.O. ADDRESS:
625 N. Milwaukee St.
Suite 404
Milwaukee, WI 53202
(414) 289-9200

February 24, 1986

85-1591

Supreme Court, U.S.
FILED
FEB 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

MARCUS GUMZ,

Petitioner,

v.

DOUGLAS MORRISSETTE & LAWRENCE CLOUTIER,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

WILLIAM H. LYNCH
625 N. Milwaukee St.
Suite 404
Milwaukee, WI 53202
(414) 289-9200

Counsel for Petitioner

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

772/1395
Ken xlen 9/27/85

CORRECTED

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 84-3124 and 84-3173

MARCUS GUMZ,

Plaintiff-Appellee, Cross-Appellant,

v.

DOUGLAS MORRISSETTE and LAWRENCE CLOUTIER,

Defendants-Appellants, Cross-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 83 C 61—James E. Doyle, *Judge.*

ARGUED JUNE 3, 1985—DECIDED SEPTEMBER 5, 1985

Before CUMMINGS, *Chief Judge*, EASTERBROOK, *Circuit Judge*, and WRIGHT, *Senior Circuit Judge.**

CUMMINGS, *Chief Judge.* Plaintiff Marcus Gumz filed this civil rights action against eleven defendants, officials and employees of the Wisconsin Department of Natural Resources ("DNR"), alleging numerous violations of the Constitution and liability pursuant to 42 U.S.C. § 1983. The district court entered judgment on a jury verdict finding that defendants had used excessive force in arresting Gumz and denied defendants' post-verdict motions seeking judgment in their favor. The court also refused plaintiff's requests to amend the judgment so that the jury verdict would be read to include liability for the seizure of plaintiff's property and denied his request for

---

* The Honorable Eugene A. Wright, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, is sitting by designation.

recovery of hospital and medical expenses. Both parties appeal the court's post-trial rulings. For the reasons set forth below, the judgment of the district court is affirmed in part and reversed in part.

I

Plaintiff Marcus Gumz at all times relevant to this case was a "muck farmer" living near Baraboo, Wisconsin. Much of the farming in this area requires continuous drainage of the low-lying fields in order to keep the land from reverting to ponds and marshes. The maintenance of drainage systems requires removal of run-off or "muck" from waterways, thus giving rise to the term "muck farmer." Gumz raised mint and other crops on his large tract of land (some 2,700 acres) but was deeply in debt (Plaintiff's App. 104). A drainage ditch known as the leech waterway ran through Gumz' property, and the farmer utilized a "dragline" or a two-ton apparatus consisting of a steam shovel and a fifty-foot boom to scoop muck out of the waterway (Plaintiff's App. 259, 260). The DNR considered the leech waterway a navigable body subject to its regulation and in 1975 commenced a civil action in state court against Gumz for dredging the ditch without a permit in violation of WIS. STAT. § 30.20 (1979).[1] That action ultimately was dismissed on September 18, 1981, after the incident at issue here occurred, because of delay and the fact that the DNR had commenced a similar and more recent action (Plaintiff's App. 212).

---

[1] The statute in force at the time relevant to this action provided in pertinent part:

> 30.20 Removal of material from beds of navigable waters. (1) Unlawful Removal. (a) No person shall remove any material from the bed of any navigable lake or from the bed of any outlying waters of this state without first obtaining a contract therefor as provided in sub. (2).

(Footnote continued on following page)

On October 28, 1980, Warden Dennis Jameson investigated a complaint of dredging of the leech waterway without a permit and issued a citation to the dragline operator. A dispute exists over Jameson's attempt to issue the citation to Gumz and over a subsequent automobile altercation where both Jameson and Gumz claimed they were run off the road by the other. Rather than serve it personally, Warden Jameson then sent by certified mail a dredging citation to Gumz regarding the October 28, 1980, incident, allegedly at the request of the district attorney (Defendants' App. 377). Gumz apparently refused to accept the citation, thinking it was a bill, and the letter was returned (Plaintiff's App. 104, 273, 274; Defendants' App. 377). The district attorney's office issued an arrest warrant and complaint (dated February 19, 1981, Defendants' App. 373) against Gumz for failure to answer the October 28, 1980, citation in court. Warden Jameson and defendant Warden Cloutier allegedly were informed of continued dredging on the Gumz property (Defendants' App. 183) and Cloutier decided on March 2 to investigate the dredging and to serve the arrest warrant on the following day (Defendants' App. 235-236, 243, 247).

On March 3, 1981, Wardens Kern and Morrissette allegedly attempted to serve the arrest warrant on Gumz at the University of Wisconsin at Baraboo, but then proceeded to the Gumz property. Wardens Cloutier and Zabel first proceeded by car to the Gumz farm, observed the dredging in progress and ordered six reserve DNR

---

[1] *continued*

> (b) No person shall remove any material from the bed of any lake or stream not mentioned in par. (a) without first obtaining a permit from the department under sub. (2)(c).
>
> (c) Any person violating this section shall forfeit not more than $1,000 for each such violation.
>
> • • • •

WIS. STAT. § 30.20 (1979).

personnel, who had been instructed to wait ten miles away, to stand by one mile from the Gumz property (Defendants' App. 235). Cloutier decided to arrest Gumz and knocked on plaintiff's door but he did not answer (Defendants' App. 235, 243, Plaintiff's Br. 9). Kern and Morrissette then arrived by auto and knocked on Gumz' door to serve the warrant and Gumz again did not answer. Cloutier and Zabel walked 100 yards to the site of the dredging and arrested the operators (Defendants' App. 235). Gumz exited his house, drove to the Kern-Morrissette vehicle and ordered it off his farm. After allegedly being informed of the warrant for his arrest, Gumz returned to his car and backed into the Kern-Morrissette vehicle (Defendants' App. 245). The severity of the collision and the intended destination of Gumz (the dragline site or his house) were subjects of dispute below. At any rate, after the collision Gumz drove toward his house and at that point defendant Cloutier called the six DNR reserves onto the Gumz property. They entered the property at high speeds and after a brief chase blocked the path of Gumz' auto without contacting plaintiff or his vehicle. The ten DNR personnel were armed with a rifle, pistols, and shotguns. (Plaintiff's App. 286-300.) Gumz then raised his hands in surrender and was arrested without incident and the dragline was seized and removed from the Gumz property (Plaintiff's App. 149-159; Defendants' App. 240-241, 264).

Gumz was taken to the Sauk County Sheriff's office where he was charged by the defendants with violating the dredging law and with a felony of criminal damage to property (Plaintiff's App. 317-318). During his custody Gumz became ill and ultimately he was released after posting a $443 bond (Defendants' App. 319, Plaintiff's App. 318). Almost immediately after his release Gumz was hospitalized for an emergency operation to implant a pacemaker, which he subsequently underwent (Plaintiff's App. 321-327).

Plaintiff filed this action on January 24, 1983, in the United States District Court for the Western District of

Wisconsin, seeking $1.425 million in compensatory damages and $1 million in punitive damages. Gumz' complaint charged that the incident of March 3 resulted in violations of the First, Fourth, Fifth, Eighth and Fourteenth Amendments to the United States Constitution and gave rise to liability under 42 U.S.C. §§ 1981, 1982, 1983, 1985(2), 1985(3), 1986 and 1988, and under Wisconsin law. In its Order of August 3, 1984, the district court dismissed all claims, except those arising under § 1983 and under state law, for failure to state a claim on which relief could be granted. The court also ruled that plaintiff's complaint did not adequately allege a violation of the Fourth Amendment so as to state a claim under § 1983 since neither the absence of probable cause nor of a neutral and detached magistrate was asserted. This ruling has not been contested. Judge Doyle did hold that valid claims under § 1983 were stated only with respect to the First and Fourteenth Amendments. See pp. 16-17 of opinion of August 3, 1984 (R. Item 26).

The First Amendment claim involved alleged retaliation toward and deterrence of Gumz in the exercise of his rights of expression.[2] Deprivations of plaintiff's liberty and property without due process of law contrary to the Fourteenth Amendment could have resulted, in the court's view, from the use of excessive force in arresting Gumz, from the seizure of the dragline without probable cause to believe it was being used illegally, from holding and interrogating the plaintiff at the sheriff's office for an excessive period of time, and from deliberate and callous indifference to plaintiff's medical needs during his confinement. (8/3/84 Order at 13-18.) Finally, the court ruled that the complaint stated a claim under Wisconsin law for assault and battery, false arrest, false imprisonment, intentional and negligent infliction of mental distress, abuse of process and negligence (8/3/84 Order at 18,

[2] Gumz has been involved in public efforts to control the DNR and has frequently spoken out against the state agency (Br. 20-21).

25). The court denied all of defendants' motions for summary judgment. Plaintiff does not appeal any of the adverse rulings in the August 3 Order.

On September 7, three days before trial, the court dismissed plaintiff's state law claims for failure to comply with the Wisconsin notice of claims statute (R. Items Nos. 43 (par. 8), 51 and 53), and this dismissal is not challenged.

At the close of plaintiff's case and at the close of all the evidence defendants moved for a directed verdict on all issues. The court granted the defendants' motions for directed verdict in part, dismissing most of the lower level DNR officials and employees from the case. The court took away from the jury the issues of excessive interrogation of plaintiff and of deliberate and callous indifference to plaintiff's medical needs during his confinement. (Defendants' App. 408, 440, 427-428.)

Both sides presented evidence at trial attempting to demonstrate the necessity and reasonableness or the excessiveness and unjustifiability of the degree of force amassed on March 3. The jury returned verdicts in favor of plaintiff and against defendants Morrissette and Cloutier on only one issue, finding that they had caused "the use of excessive force in the arrest of plaintiff on March 3, 1981," and also that Cloutier alone had maliciously caused the use of such force. The jury found that Morrissette and Cloutier had 1) not used excessive force in retaliation for Gumz' opposition to DNR policies and practices nor to deter plaintiff from such expressions in the future, 2) not caused the plaintiff to be confined for an excessive period of time on March 3, 1981, and 3) seized the dragline on March 3 (Cloutier maliciously and Morrissette without a good faith belief that it was constitutional), but had probable cause to believe the apparatus was being used to dredge the leech waterway. Finally the jury found that the use of excessive force caused plaintiff to suffer emotional distress on March 3 and in the immediate aftermath but did not cause him to suffer a heart problem or a persistent change in person-

ality. Compensatory damages of $50,000 and medical expenses of $15,000 were awarded against both defendants and $10,000 in punitive damages was awarded against Cloutier (R. Item 78).

The court entered judgment on the verdict on October 19, 1984, dismissing on the merits all other claims against Cloutier and Morrissette, and dismissing all claims against all other defendants. The state law claims were included in the dismissals. The court denied all post-verdict motions and it is from those denials that the parties specifically appeal.

II

Although the manner in which the issues of this case ultimately were framed for trial was somewhat unusual, this appeal appears to raise two main questions. First, did the use of force by defendants in executing the March 3, 1981, arrest amount to a constitutional violation, and second, did the seizure of plaintiff's dragline on the same date constitute a deprivation of property without due process of law? We turn first to the excessive force issue.

A. EXCESSIVE USE OF FORCE

In *Blake v. Katter*, this Court expressly recognized that "an allegation of excessive force during an arrest is cognizable under § 1983." 693 F.2d 677, 682 (1982). The constitutional provision on which most courts, including the district court (8/3/84 Order at 16-17), ground a § 1983 claim solely alleging excessive use of force by state officials is the Fourteenth Amendment. In other words, the use of force is treated as a potential deprivation of liberty without due process of law. *Blake v. Katter*, 693 F.2d at 682; *Black v. Stephens*, 662 F.2d 181, 188 (3d Cir. 1981), certiorari denied, 455 U.S. 1008; *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981), affirmed on other grounds *sub nom. Kush v. Rutledge*, 460 U.S. 719; *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981);

Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973), certiorari denied *sub nom. John v. Johnson*, 414 U.S. 1033; *Dobson v. Green*, 596 F. Supp. 122, 125, 124 (E.D. Pa. 1984); but see *Jenkins v. Averett*, 424 F.2d 1228, 1232 (4th Cir. 1970) (Fourth Amendment made applicable to states by Fourteenth Amendment protects persons from injuries arbitrarily inflicted by state officials);[3] *Lykken v. Vavreck*, 366 F. Supp. 585, 595 (D. Minn. 1973) (excessive force in effecting arrest governed by Fourth Amendment).

The primary inquiry in addressing an excessive force claim brought under § 1983 is whether the conduct of state officials was so egregious or intolerable as to shock the conscience of the court and constitute a constitutional violation as opposed to a mere violation of state tort law. The Supreme Court has made it clear that "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law," *Baker v. McCollan*, 443 U.S. 137, 146, and that "not every injury in which a state official has played some part is actionable under [§ 1983]." *Martinez v. California*, 444 U.S. 277, 285. Consequently remedies for violations of duties arising out of tort law must be sought in state court. *Baker*, 443 U.S. at 146.

The right protected by the Fourteenth Amendment in the context of claims of excessive force is "the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as to literally shock the conscience of the court." *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980). The determination of whether this right has been violated

---

[3] Since plaintiff failed below to amend his complaint after his claims based on the Fourth Amendment were dismissed (*supra* p. 5) and has not raised any Fourth Amendment issue on appeal, we need not consider whether the March 3 incident involved an unreasonable search or seizure and for purposes of the excessive force issue we must assume that the arrest itself was legal. See *Lieutenant Mary Ogden v. United States*, 758 F.2d 1168, 1175 (7th Cir. 1985); *City of Chicago v. United States Dep't of Labor*, 753 F.2d 606, 607 n.1 (7th Cir. 1985).

(Footnote continued on following page)

requires a certain amount of line-drawing, and must be resolved on a case-by-case basis. See *Shillingford*, 634 F.2d at 265; *Johnson v. Glick*, 481 F.2d at 1032-1033. Three of our sister Circuits utilize a three-part standard to provide guidance in making this delicate determination and we adopt the test. According to this standard the use of force by a state officer is unconstitutional if it 1) caused severe injuries, 2) was grossly disproportionate to the need for action under the circumstances, and 3) was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience. See *Wise v. Bravo*, 666 F.2d 1328, 1333 (10th Cir. 1981); *Shillingford*, 634 F.2d at 265 (5th Cir.); *Hall v. Tawney*, 621 F.2d at 613 (4th Cir.).

Application of this standard to the instant case indicates that defendants' conduct did not amount to a constitutional violation. Since there is sufficient evidence

---

[5] *continued*

If an excessive use of force were viewed as implicating the Fourth Amendment it would appear that the doctrine of *Parratt v. Taylor*, 451 U.S. 527 (see *infra* p. 15) would not present a bar to such a claim, since *Parratt* is inapplicable where the plaintiff asserts a violation of substantive constitutional guarantees as distinguished from procedural due process rights. See *Bell v. City of Milwaukee*, 746 F.2d 1205, 1239 n.39 (7th Cir. 1984). Although several district courts have recently held that *Parratt* applies to excessive force claims brought under § 1983, see, *e.g.*, *Dobson v. Green*, 596 F. Supp. 122 (E.D. Pa. 1984); *Barnier v. Szentmiklosi*, 565 F. Supp. 869 (E.D. Mich. 1983), defendants waived any argument that *Parratt v. Taylor* bars plaintiff's excessive force claim by not raising the issue in the district court. See *Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1220 (7th Cir. 1984).

The Supreme Court's willingness to address an excessive force claim under the Fourth Amendment in *Tennessee v. Garner*, 471 U.S.____, 105 S.Ct. 1694, 85 L. Ed. 2d 1, clearly indicates the propriety of a Fourth Amendment analysis of such claims. Since no substantive due process claim was before the Court in *Garner*, that decision does not invalidate a Fourteenth Amendment analysis of excessive force claims, and only that Amendment is before us.

to support the jury's finding that Cloutier maliciously caused the use of excessive force, and in view of the fact that the draconian operation of March 3, 1981, was orchestrated to secure payment of a $100 civil penalty and terminate further civil violations, it would not be proper for this Court to reverse the district court's judgment on the basis of either the second or third criterion of the three-part test. A review of the court's holdings and the jury's findings with respect to the injury sustained by Gumz as a result of the March 3 incident, however, forces us to conclude that this case does not involve the type of severe harm redressible under § 1983.

The situation before us viewed in its worse light can be summarized as follows: two state officials implemented an operation to enforce a civil statute that utilized too many bodies and too many guns and those officials maliciously planned the needlessly dramatic and coercive operation knowing it would surprise, frighten, upset and anger the plaintiff. The jury found that the harm or injury resulting to Gumz because of the incident was "emotional distress on March 3, 1981 and in the immediate aftermath" (R. Item 78). The jury specifically refused to find that the use of force caused plaintiff to suffer either a "heart problem" or a "persisting change in personality" (*id.*). In his post-trial motions, plaintiff asserted that he should be compensated for hospital and medical expenses incurred shortly after the March 3 incident, but the district judge rejected this contention, explaining:

> The critical point is that the jury found that the defendants' conduct had not caused anything but the immediate emotional distress, and that determination is supported by credible evidence. * * * And there was no basis in the evidence for suggesting that during that short term, which was referred to in the order by the words, "On March 3, 1981 and in the immediate aftermath," * * * that injury to the plaintiff involved the necessity for medical care and hospitalization and various procedures and so on * * * . (11/21/84 Transcript at pp. 68-69).

Neither the court nor the jury found that Gumz was struck, pushed, mistreated or threatened during the incident or suffered even any minor physical injuries as a result of the incident. With respect to the post-arrest period, the district judge ruled as a matter of law that there was no excessive questioning of Gumz and no deliberate or callous indifference to his medical needs (Defendants' App. 426-429). The jury found that there was no excessive period of confinement of Gumz (R. Item 78). Thus the only force involved here was the grossly excessive demonstration of manpower and firepower. The only resulting injury or harm was the understandable emotional distress suffered by the unsuspecting and unwary target of the display. Where the undue force underlying an excessive force claim primarily consists of an abstract demonstration of force and not its actual use, a justified finding of liability under § 1983 would be most unusual.

While this type of unnecessary display of force can hardly be condoned, the restraint shown by these officials in utilizing the force amassed and the absence of any physical or bodily injury place this case with those claims actionable only under state tort law. Plaintiff cites and this Court can discover no case allowing recovery for use of excessive force under § 1983 where there was an absence of any kind of bodily or physical injury resulting from the use of force. Plaintiff argues that *Lykken v. Vavreck*, 366 F. Supp. 585 (D. Minn. 1973), allowed recovery under § 1983 under similar circumstances. Although *Lykken* did involve the unnecessary utilization of ten to twenty uniformed policemen to break up a peaceful gathering, the court's holding of liability under § 1983 rested predominantly on the fact that the police raid "was undertaken as a harassment tactic, because of plaintiffs' political beliefs" with a purpose "antithetical to the First Amendment." 366 F. Supp. at 595. In the present case the jury expressly found that the defendants' actions were not taken to retaliate for or deter Gumz' expressions of opposition to DNR policies and practices (R. Item 78). The *Lykken* court also appeared to base § 1983 liability in part

on Fourth Amendment considerations to which plaintiff, as noted *supra* note 3, has waived any objections. 366 F. Supp. at 595.

This Court is not holding that some type of bodily injury is an absolute requirement to § 1983 liability based on an excessive force claim. But the ultimate question here is, after all, whether the use of force was so egregious as to be constitutionally excessive, and the presence of some physical injury is certainly relevant to that determination. Circumstances involving actions of state officials maliciously designed to take advantage of a known mental weakness or instability and to evoke an extreme emotional response from an individual could violate Fourteenth Amendment due process guarantees (even if the emotional distress suffered by the individual did not result in any observable physical symptoms). In such a case the "severe injury" required by our three-part standard would be present. Although defendants here must have known that their operation would upset and anger the plaintiff, the facts of this case as determined by the judge and jury do not implicate the type of "brutal and demeaning" attack on the psyche of Marcus Gumz which would be actionable under § 1983.[4]

B. SEIZURE OF THE DRAGLINE

The district court appeared to rule that the alleged seizure of plaintiff's dragline stated a valid claim under § 1983 on the theory that the seizure potentially con-

---

[4] *Duncan v. Nelson*, 466 F.2d 939, 945 (7th Cir. 1972), certiorari denied, 409 U.S. 894, which held that "physical violence need [not] be present to produce the coercion necessary to constitute an involuntary confession cognizable under § 1983," is not contrary to our holding today. While the presence or threat of physical violence is indeed of limited relevance to determining whether psychological coercion rendered a confession involuntary, the absence of such violence or of any resulting physical injury is most relevant to the inquiry of whether the use of force by state officials is so excessive as to shock the conscience of the court.

stituted a deprivation of property without due process of law in violation of the Fourteenth Amendment (8/3/84 Order pp. 16-17).[5] In framing the issue for trial, the court reasoned that a jury finding of probable cause that the dragline was being used for dredging on March 3 would puncture any contention that the seizure violated due process constraints (*id.* at 17; R. Item 78; Defendants' App. 433). The plaintiff objected to this approach both below and here by arguing that even if probable cause existed, the seizure added weight to the excessive force claim and formed part of the basis of the jury's award compensating plaintiff for his emotional distress because the seizure was wholly unnecessary and maliciously undertaken (Br. 32-36; Defendants' App. 102-103, 441-442; 11/26/84 Order).

The defendants seemingly suggest that the district court's analysis of the deprivation of property issue is justified by the DNR officials' need to seize the dragline as evidence of the illegal dredging (Reply Br. 12). We fail to understand how this need justifies the seizure without notice or hearing of property used to commit a civil violation. Since the plaintiff raises this point indirectly on appeal (Br. 33-34) and appears to have raised it below (Defendants' App. 441-442), we will not rule that Gumz has waived objection to the district court's error. We nevertheless affirm the district court's refusal to allow Gumz compensation for the seizure under § 1983 since under *Hudson v. Palmer*, 468 U.S.____, 104 S.Ct. 3194, 82 L. Ed. 393, it is clear that the seizure was not a deprivation of property without due process of law.

Because plaintiff's dredging was not prohibited by a criminal statute, the taking in this case cannot be justified as a seizure of the evidence or instrumentality of a crime. See *United States v. One 1967 Porsche, etc.*, 492 F.2d

[5] Any claim that the seizure constituted a violation of the Fourth Amendment was waived both in this Court and below. See *supra* note 3.

893, 895 (9th Cir. 1974). The basis for the arrest of Gumz and seizure of his property, WIS. STAT. § 30.20, see *supra* note 1, is a civil statute prohibiting the removal of "any material from the bed of any lake or stream" and providing that any person violating the statute shall "forfeit not more than $1,000 for each such violation." The relevant enforcement section of the Harbors and Navigation Chapter (in which § 30.20 is located), WIS. STAT. § 30.03 (1979), states that "All forfeitures shall be recovered by civil action as provided in ch. 778."[6] It appears that a "forfeiture" of $100 was sought in the Wisconsin Circuit Court (Defendants' App. 385) under § 30.03(3). Thus the seizure here must be analyzed as a taking under the due process clause.

The Supreme Court has stated the general rule that "absent an 'extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a *prior* judicial determination that the seizure is justified." *United States v. Eight Thousand Eight Hundred & Fifty Dollars*, 461 U.S. 555, 562 n.12. A great number of cases have considered whether statutes authorizing seizures of property utilized in violations of civil statutes without a pre-deprivation hearing (or with no hearing at all) involve the necessary extraordinary circumstances. See *United States v. An Article of Device "Theramatic,"* 715 F.2d 1339 (9th Cir. 1983), certiorari denied *sub nom. Cloword v. United States*, ____U.S.____, 104 S.Ct. 1281, 79 L. Ed. 685; *Sutton v. City of Milwaukee*, 672 F.2d 644 (7th Cir. 1982); *United States v. Vertol H21C*, 545 F.2d 648 (9th

[6] The enforcement section, § 30.03, also provides that where the "public interest may not be adequately served by imposition of penalty or forfeiture," the relevant department may issue an order directing parties to refrain from certain acts, but provides that no penalty may be imposed for violation of such an order although violation of a judgment enforcing the order may be punished by civil contempt proceedings. WIS. STAT. § 30.03(4)(a), (b). There is no evidence that the DNR was proceeding under the above procedures which, in any event, are civil in nature.

Cir. 1976). Deprivation of property in the instant case involves a special kind of taking by the state, expressly considered by the Supreme Court in *Parratt v. Taylor*, 451 U.S. 527, where the loss of property "is occasioned by a random, unauthorized act by a state employee, rather than by an established state procedure." *Hudson*, 468 U.S. at ____, 104 S.Ct. at 3203, 82 L. Ed. at 406. In such circumstances, where the state cannot predict or realistically prevent the deprivation of property, *Parratt* ruled that the Fourteenth Amendment is not violated if the state provides a meaningful post-deprivation remedy. 451 U.S. at 541-543. Although the rule of *Parratt* was necessarily limited by the facts of that case to negligent deprivations of property, the Supreme Court in *Hudson v. Palmer* extended the holding of *Parratt* to intentional deprivations of property. 468 U.S. at ____, 104 S.Ct. at 3203, 82 L. Ed. at 407..

There is no dispute that the instant case involved an intentional taking of plaintiff's property. It is also clear that the deprivation was the result of a random and unauthorized act of a state official. Neither WIS. STAT. § 30.20(1)(b) nor WIS. STAT. § 30.03(3) authorized the seizure of Gumz' property. The Wisconsin civil action for recovery of statutory forfeitures, WIS. STAT. § 778 (1979), allows a court to issue an arrest warrant if an alleged violator has failed to appear in court as required by the civil citation. See WIS. STAT. § 778.25(8)(a). The defendants were acting under such a civil arrest warrant issued because of Gumz' failure to answer to the dredging citation (Defendants' App. 373; Defendants' Exhibit 10). See WIS. STAT. § 778.25(8)(a). Seizure of a civil defendant's property would only be permissible after entry of judgment and issuance of a writ of execution by the court. See WIS. STAT. § 815.02, 815.05. There is no evidence that the proceedings against Gumz had reached this stage. Consequently, our remaining inquiry is solely whether Wisconsin provided the plaintiff with a meaningful post-deprivation remedy to redress the taking of his property. We are satisfied that the remedies are adequate.

Wisconsin law contains a provision which establishes a simple procedure for obtaining the return of property seized with or without a warrant and such property may be withheld only if it is contraband or is needed for evidence. See WIS. STAT. § 968.20. An action for "the recovery of personal property or the unlawful withholding or conversion of personal property" also exists under Wisconsin law. See WIS. STAT. § 895.01(1); *Preston v. United States*, 696 F.2d 528 (7th Cir. 1982); *Production Credit Association v. Nowatzski*, 90 Wis. 2d 344, 280 N.W.2d 118 (1979). An action for trespass to personal property is also available. See *Wisconsin Power & Light Co. v. Columbia County*, 3 Wis. 2d 1, 87 N.W.2d 279 (1958). If defendants were acting without authority, as it appears, they would be personally amenable to suit under Wisconsin law since Wisconsin public officers enjoy no immunity when acting in clear absence of all jurisdiction or authority, see, *e.g.*, *Maynard v. Madison*, 101 Wis. 2d 273, 304 N.W.2d 163, 167 (1981), or when engaging in malicious, wilful and intentional conduct. See, *e.g.*, *Yotvat v. Roth*, 95 Wis. 2d 357, 290 N.W.2d 524, 530 (1980). But even if defendants were acting "in their official capacity or in the course of their agency or employment," the only prerequisite to an action against them is the service upon the Wisconsin attorney general of written notice of the claim within 120 days of the event causing the injury or damage giving rise to the claim. See WIS. STAT. § 893.82(1).

Because Wisconsin provides Gumz with adequate post-deprivation remedies for the seizure of his property, no violation of the Fourteenth Amendment occurred in this case.

The district court's judgment is affirmed to the extent it does not allow compensation to the plaintiff for the seizure under § 1983. The judgment is reversed with respect to the excessive force claim with directions to enter judgment for the defendants.[7]

---

[7] In view of our holding, we do not address the plaintiff's argument that he is entitled to recover hospital and medical

(Footnote continued on following page)

EASTERBROOK, *Circuit Judge*, concurring.

Chief Judge Cummings has written a thoughtful and comprehensive opinion. I join all of it except Part II.A. With respect to that portion I concur only in the judgment. The difference between our positions is subtle but important. Part II.A analyzes a claim of excessive force in making an arrest as one of substantive due process, which permits decisionmakers to award damages for conduct that "shocks their consciences." I conclude that such claims should be assessed under the standards of the Fourth Amendment. If an arrest is objectively reasonable within the meaning of the Fourth Amendment, that should be the end of the matter.

The most natural way to think about a claim that officers used excessive force in making an arrest is as an assertion that they violated the commands of the Fourth Amendment, the only part of the Constitution directly addressing seizures of the person by police. To say that police used excessive force is to say that they violated people's "right to be secure in their persons . . . against unreasonable . . . seizures." The only time the Supreme Court has held that the police used excessive force in making an arrest, it did so under the Fourth Amendment. *Tennessee v. Garner*, 105 S. Ct. 1694 (1985) (deadly force may be used to make an arrest only if the suspect appears dangerous). The Court also has said that officials' compliance with the Fourth Amendment forecloses actions for the deprivation of liberty at the time of an arrest. *Baker v. McCollan*, 443 U.S. 137 (1979). We have held several times that "a person who is arrested pursuant to a facially valid warrant . . . generally has no claim for an unconstitutional deprivation of liberty under section 1983." *Mark v. Furay*, No. 83-3059 (7th Cir. Aug. 8, 1985), slip op.

---

[1] *continued*

expenses from defendants nor defendants' arguments that the district court erred in permitting plaintiff to recover punitive damages and in ruling that defendants had waived the defense of qualified immunity.

4; *Friedman v. Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1344 n.10 (7th Cir. 1985); *Terket v. Lund*, 623 F.2d 29, 31 (7th Cir. 1980).

The majority properly emphasizes that the majority of appellate courts that have considered claims that excessive force was used to make an arrest have analyzed these claims as deprivations of liberty under the Fourteenth Amendment rather than as unreasonable seizures under the Fourth. But all of these cases predate *Garner*. One predates *Baker*, where the Court used the Fourth Amendment to analyze the arrest despite Justice Blackmun's invocation, in a concurring opinion, of the "shocks the conscience" test derived from *Rochin v. California*, 342 U.S. 165, 172 (1952). See *Baker, supra*, 443 U.S. at 147 (Blackmun, J., concurring).

Although the Fourth Amendment was designed for the sort of claim Gumz presses, the Due Process Clause of the Fourteenth Amendment was not. Gumz does not want notice and an opportunity for a hearing before being subjected to a maliciously frightening arrest. He does not want process of any kind, due or otherwise. He asserts a substantive right to be free from intentional infliction of emotional distress in the course of being arrested. Cases such as *United States v. Price*, 383 U.S. 787 (1966), *Screws v. United States*, 325 U.S. 91 (1945), and *Jackson v. City of Joliet*, 715 F.2d 1200, 1202, 1204 (7th Cir. 1983) (dictum), where the police acted as judge, jury, and executioner, pose a different problem. A claim that the police never made a lawful arrest, or that after arrest the police skipped the trial on the way to the punishment, is within the central meaning of due *process*.

The use of the Due Process Clauses to achieve substantive ends has no support in the language or history of the Constitution. The language speaks of process, not substance. On the history see II Crosskey, *Politics and the Constitution in the History of the United States*, 1102-16 (1953); Corwin, *The Doctrine of Due Process of Law Before*

the Civil War, 24 Harv. L. Rev. 366-85, 460-79 (1911); Jurow, *Untimely Thoughts: A Reconsideration of the Origins of Due Process of Law*, 19 Am. J. Legal History 265 (1975). The first time the Supreme Court encountered one of the two due process clauses, it conducted a historical review and concluded that the text was designed only to incorporate some of the basic procedural guarantees of English law. *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856). See also *Hurtado v. California*, 110 U.S. 516 (1884).

Substantive due process made its entrance in Chief Justice Taney's offhand remark in *Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857), hardly an auspicious beginning. A few state courts had hinted at substantive review starting in 1820, see Corwin, *supra*. The hints flowered in 1857. Since then substantive due process has been the foundation of some of the most unsuccessful inventions in constitutional law. In addition to *Dred Scott* itself, see, e.g., *Mugler v. Kansas*, 123 U.S. 623, 661 (1887); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Lochner v. New York*, 198 U.S. 45 (1905). The Supreme Court regularly buries the doctrine, *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 535-37 (1949); *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), but it just as resolutely refuses to stay dead. See the inconclusive debate in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), in which four Justices supported the use of substantive due process to vindicate "traditional family values," four Justices denied the validity of the doctrine, and one Justice ducked the issue.

Substantive due process once was used to invalidate legislation affecting prices, wages, and hours, legislation the Court thought struck at the heart of freedom of contract. When enthusiasm for freedom of contract waned, the Court resurrected the same doctrine—with the same lack of textual and historical support—to protect a new constellation of values, this one having to do with

family, procreation, and privacy. What unites the many lives of substantive due process is any action "deeply repulsive to the feelings of Supreme Court Justices." *Bigby v. City of Chicago*, 766 F.2d 1053, 1058 (7th Cir. 1985). This is the sense in which the doctrine was used in *Rochin*, which declared that the use of a stomach pump to obtain evidence violates the Due Process Clause of the Fourteenth Amendment.

Rochin was a transitional case. The majority resorted to substantive due process in *Rochin* because the Court had not yet decided whether the Fourteenth Amendment incorporated the meaning of the Fourth. As the majority saw things, there was no other way to protect the deeply held value of the integrity of one's body. The Court now has held, rightly or wrongly, that the Fourth Amendment applies fully to the states through the Fourteenth. This has transformed the Court's approach to issues of bodily integrity. For example, *Winston v. Lee*, 105 S. Ct. 1611 (1985), applied the reasonableness test of the Fourth Amendment to decide whether officials may put a suspect under general anesthesia and invade his body to extract a bullet that may link him with a crime. See also *United States v. Montoya de Hernandez*, 105 S. Ct. 3304 (1985) (Fourth Amendment analysis of a lengthy detention so that officials could examine the contents of a person's excreta); *Schmerber v. California*, 384 U.S. 757 (1966) (Fourth Amendment analysis of a forcible extraction of blood). In *Winston* the Court relegated *Rochin* to passing mention in a footnote. 105 S. Ct. at 1617 n.5. In *Montoya de Hernandez* the Court did not cite *Rochin*.

Because substantive due process has always been so dependent on the personal feelings of the Justices; because it has no pedigree other than a trail of defunct, little-mourned, and sometimes (as in *Dred Scott*) pernicious doctrines; and because there is no need to conjure up a constitutional doctrine when there is an Amendment directed to this specific subject, we should not employ substantive due process here. Substantive due process is a

shorthand for a judicial privilege to condemn things the judges do not like or cannot understand. The constitution does not give such power to judges. Whatever the demands of the consciences of the Justices, we ought not instruct randomly selected jurors or the relatively numerous lower federal judiciary to vindicate *their* consciences as well as those of the Justices. The Justices ultimately may instruct lower courts to follow such a path, but *Garner*, *Winston*, and *Baker* offer little reason to believe they will. It is unnecessary to supply a right of action for conduct in arrests that "shocks the conscience" in order to furnish a reasoned foundation for any line of cases in the Supreme Court; it is not a logical outcome of any line of cases. Until the Supreme Court holds that substantive due process is the right way to think about claims arising out of fright in the course of being arrested, lower courts ought not to make the choice voluntarily. See *Dronenburg v. Zech*, 741 F.2d 1388, 1396-97 (D.C. Cir.), *reh. denied*, 746 F.2d 1579 (1984).

The choice between substantive due process and reasonableness under the Fourth Amendment puts more than nice questions of doctrine at stake. The notorious difficulties in defining reasonableness under the Fourth Amendment are insignificant compared to the randomness that flows from asking people what shocks their consciences. Reasonableness is an open-ended approach, to be sure, but it has roots in tort law. It calls for an objective balancing of the harms from the arrest or search against the potential harms to effective law enforcement of delaying the action or not acting at all. The graver the crime and the more exigent the circumstances, the more police can do—whether that means searching on a lesser probability of finding something, entering a dwelling at night, or tearing a house apart in search of evidence. See *Llaguno v. Mingey*, 763 F.2d 1560, 1564-67 (7th Cir. 1985) (en banc). See also Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227, 252-60 (1984).

The Supreme Court, aware of the difficulties in defining what is reasonable, has been trying to codify the

concept, replacing balancing tests with rules whenever possible. Compare *United States v. Robinson*, 414 U.S. 218 (1973), *New York v. Belton*, 453 U.S. 454 (1981), and *United States v. Ross*, 456 U.S. 798 (1982), with *Illinois v. Gates*, 462 U.S. 213, 230-41 (1983). See also LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 Sup. Ct. Rev. 127. There is now a tremendous body of precedent dealing with searches and seizures, and these cases furnish rules that ought to be sufficient guidance in a case such as this. Yet a "shocks the conscience" test spurns bright lines. It spurns rules. It is a vague standard—if it can be called a "standard" at all—inviting decisionmakers to consult their sensibilities rather than objective circumstances. Sensibilities vary from person to person and place to place; an officer told to do nothing that "shocks the consciences" of six people to be drawn out of a jury wheel some years hence would have considerable difficulty knowing how to behave.

The most significant difference between substantive due process and reasonableness under the Fourth Amendment is that one requires scrutiny of motive and the other forbids it. The third part of the standard the majority adopts in Part II.A is whether the official action "was inspired by malice." The plaintiff puts the officials' motives in issue and invites the jury to be "shocked" by malice or any other evidence that the police wanted to "get" the plaintiff. That is what this trial was all about. The bulk of the evidence was devoted to showing that the defendants had a long-running dispute with Gumz and set up his arrest in order to annoy, aggravate, frighten, and humiliate him. This was the basis of the award of punitive damages against Cloutier.

The Fourth Amendment, in contrast, calls for objective inquiry only. The officer's pure heart provides no defense if his conduct was unreasonable in light of the facts he knew or should have known; the officer's evil design does not invalidate his acts if the facts otherwise support his deeds. *Scott v. United States*, 436 U.S. 128, 135-

39 (1978). Our circuit has held consistently that a person "cannot claim that his arrest violated his constitutional rights merely because the defendants had malicious motives for arresting him." *Mark v. Furay, supra*, slip op. 5 (collecting cases). Motive counts in the sense that "bad faith" efforts to obtain a warrant (as by misrepresenting facts), or "bad faith" efforts to execute a warrant (as by exceeding its scope), may invalidate an arrest, but in such cases "bad faith" is simply a label attached to objectively unreasonable conduct (such as lying to the magistrate to obtain the warrant). See, e.g., *Olson v. Tyler*, No. 83-2644 (7th Cir. Aug. 21, 1985).

The Supreme Court's effort to reduce the uncertainty police face under the reasonableness standard of the Fourth Amendment depends on treating the inquiry as objective. Only an objective approach can sustain bright line rules of conduct. The Court also has driven subjective inquiries from the law of "good faith" or qualified immunity for conduct by the police. An officer whose acts do not violate "clearly established" law is immune no matter his motive. *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2818-20 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982). The Supreme Court altered the standard of qualified immunity in *Harlow* precisely to get rid of any inquiry into motive, an inquiry that had bedeviled and prolonged litigation without serving any substantial purpose. The Court concluded that subjective inquiries should be eliminated because there "often is no clear end to the relevant evidence" (457 U.S. at 817) and because, among many other things, they make summary judgment all but impossible (*id.* at 816). Yet subjective inquiries are an essential part of the approach to substantive due process the majority adopts today.

The analysis of this case under the Fourth Amendment is straightforward. The wardens had a warrant for Gumz's arrest. They knew Gumz to be irascible and uncooperative; he had refused to accept a citation by hand or by mail. (Whether they also reasonably thought Gumz armed and dangerous was a subject of dispute that the

jury evidently resolved adversely to the defendants.) Although Cloutier and Morrissette assembled a team of officers, they initially sent only two onto Gumz's farm. These two knocked peaceably on Gumz's door during working hours, and he refused to answer or come out. At this point they would have been authorized by the warrant to break open the door and take Gumz by force; they elected instead to wait him out. Two additional wardens then appeared to deal with the dragline and its operator. Not until Gumz scrambled into his car and sped down the road, only to collide with other officers and careen back toward the house, did the remaining six officers materialize around the house. There they arrested Gumz without a scuffle. There was no unduly offensive touching. Perhaps all of this could have been done with two officers, but the Fourth Amendment does not require the police to use the minimum number of officers to make an arrest. Putting all questions of motive aside, as the Fourth Amendment requires, I conclude that no juror could have found this measured increase in the number of wardens—with no use of force—to be unreasonable.

The majority correctly observes that the district court resolved against Gumz all issues he raised under the Fourth Amendment. Of course, an appellate court may affirm a judgment on any ground properly preserved at trial. *Massachusetts Mutual Life Insurance Co. v. Ludwig*, 426 U.S. 479 (1976). My analysis of the Fourth Amendment issue is necessary to determine whether Gumz's judgment should be affirmed on this alternate ground. But if, as the majority concludes, no Fourth Amendment issue properly is before us, then the correct disposition of the case is to reject the claim of substantive due process as legally unsound and reverse for that reason. We ought not to adopt substantive due process as the law of this circuit for claims of excessive force just because the parties have addressed this case exclusively in those terms.

If the argument I have made is incorrect, however, and this case properly should be analyzed under the Due Process Clause, it is necessary to confront some additional

issues. One is the identification of a "liberty" interest. Freedom of movement is a part of every person's natural liberty, *McKinney v. George*, 726 F.2d 1183, 1189 (7th Cir. 1983), and being arrested deprives a person of that liberty for the duration. Serious physical injuries in the course of an arrest deprive a person of liberty (and maybe, as in *Garner*, of life) in addition to the deprivation incident to an ordinary arrest. See *Davis v. Forrest*, No. 84-2484 (8th Cir. July 17, 1985), slip op. 3 (a battery must be "brutal and demeaning" to state a claim of deprivation of liberty); *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981) (a physical injury in the course of an arrest is not a deprivation of liberty unless the injury is "severe"). But Gumz is not (any longer) challenging the fact of his arrest. He was arrested under a warrant we must assume to be valid. He was not physically injured in the course of the arrest. Although he was technically assaulted when the officers put Gumz in apprehension of an imminent offensive touching, this was a privileged assault because the officers were entitled to touch Gumz and take him away. The interest that concerns us now is not freedom of movement but freedom from gratuitous fright or shock. This is not a liberty interest.

An interest in being free from malicious or gratuitous fright or shock is not part of the freedoms recognized in English law in 1791. It is a recent development. It is very similar to the tort of intentional infliction of emotional distress. "Not until comparatively recent decades has the infliction of mental distress served as the basis of an action, apart from any other tort." Prosser & Keeton, *Torts* § 12 at 55 (5th ed. 1984). The Constitution does not follow the latest developments in tort law. *Baker v. McCollan*, *supra*; *Paul v. Davis*, 424 U.S. 693 (1976). "Liberty" comprises a smaller, more traditional assortment of interests. In *Paul* the Court held that a person lacks a liberty interest in his reputation, although libels may shock and frighten as well as sully one's reputation, and although defamation was a tort recognized in 1791. The plaintiff in *Paul* could not have prevailed by

recharacterizing his libel action as one for intentional infliction of mental distress. What the wardens did to Gumz may have been tortious under state law, but they did not deprive Gumz of liberty within the meaning of the Fourteenth Amendment.

If fright deprived Gumz of liberty, it still does not follow that he may bring suit under § 1983 to recover. A state deprives someone of liberty without due process only when it permits its officials to act without either prior, or effective subsequent, remedies. If a state offers its residents effective remedies for random and unauthorized wrongs done them, those remedies are the due process of which the Constitution speaks. *Parratt v. Taylor*, 451 U.S. 527 (1981). Gumz does not challenge established state procedures within the meaning of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). He contends that the officers' acts were unauthorized under state as well as federal law.

The majority concludes, *ante* at 10 n.3, that *Parratt* does not apply to claims of "substantive constitutional guarantees as distinguished from procedural due process rights." This is an accurate statement of the law in this circuit. But I believe that *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 105 S. Ct. 3108, 3121-22 & n.14 (1985), and *Hudson v. Palmer*, 104 S. Ct. 3194, 3202-04 (1984), should persuade us to rethink our cases. *Williamson* applied *Parratt* to the deprivation of a substantive right—the right not to have one's property taken for public use without just compensation. A state may take property without any process; it just must pay for what it takes. The Court analyzed a takings claim under *Parratt* by concluding that the deprivation is not complete until the state fails to pay for what it has taken. In *Hudson* the claim was that prison officials intentionally destroyed property a prisoner was allowed to keep in his cell. See also *Ingraham v. Wright*, 430 U.S. 651, 674-82 (1977), which holds that remedies under tort law are due process for the harms inflicted by excessive or unjustified

paddling of a child by a teacher. Both *Hudson* and *Ingraham* were presented to the Court as claims to prior hearings, and so they are not formally inconsistent with the analysis in this court's cases. But the line between process and substance in those cases was almost too fine to perceive, and in *Williamson* that line disappeared. *Parratt* therefore should be applied to a claim of the unauthorized use of excessive force in making an arrest.

In fine, it does not matter to the outcome in this case whether the court uses the Fourth Amendment or substantive due process to analyze Gumz's claims. The officers' conduct was objectively reasonable under the Fourth Amendment. The majority rejects the substantive due process claim on the facts; I would reject such a claim for want of a liberty interest and because the state supplies the appropriate remedy. Today's selection of a method of analysis may control the outcome in future cases, however, and tomorrow's cases should be assessed exclusively under the standards of the Fourth Amendment.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—9-5-85—450

Excerpts from United States District Court for the Western District of Wisconsin Memorandum dated November 26, 1984.

This memorandum is intended as a brief amplification of the reasons for my rulings from the bench on November 21, 1984 on certain motions by defendants and by plaintiff.

1. Plaintiff's motion for reduction of the jury award

The jury found that $50,000 is the sum of money which would reasonably compensate plaintiff for his suffering from emotional distress on March 3, 1981 and in the immediate aftermath, and that $10,000 is the sum which should be awarded against defendant Cloutier as punitive damages. By motion dated October 26, 1984, defendants moved for certain specified relief and "in the alternative, for the additional relief discussed in the attached brief." The brief contended that: (1) there was insufficient evidence for the jury on the causal connection between the excessive force in the arrest caused by

defendants Morrissette and Cloutier and any emotional distress suffered by plaintiff on March 3, 1981, and in the immediate aftermath; (2) there was insufficient evidence for the jury to find malice on the part of defendant Cloutier; and (3) both the compensatory and punitive damages were excessive in amount. I address these points in inverse order.

The claim of excessiveness has not been developed by defendants in any way. The sum of $10,000 is clearly not excessive as a punitive measure for malicious violation of a constitutional right. The sum of $50,000 as compensation for brief emotional distress is questionable. However, there was considerable evidence from which the jury could reasonably have found that for this particular plaintiff, the emotional distress, even though brief, was unusually intense and severe. I consider that while the plaintiff bore the burden of proof at the jury stage, defendants bear it on their motion for a reduction. No information has been presented from which I can determine that the award is out of line compared

to awards in other similar cases. I cannot find that the $50,000 award is "monstrously excessive" or "so large as to shock the conscience of the court." Mary Beth G. and Sharon N. v. City of Chicago, 723 F.2d 1263, 1275 (7th Cir. 1983) (as modified). See also, Levka v. City of Chicago, No. 1055 (7th Cir. November 19, 1984).

The jury observed defendant Cloutier's demeanor as a witness. It had before it abundant evidence of encounters between plaintiff and DNR personnel. It was free to find that defendant Cloutier's conduct on March 3, 1981 was "inflicted under circumstances where insult is intended." The jury instructions on the point, unobjected to, permitted a resulting finding of malice.

While expressly finding an absence of causal connection between the use of excessive force in the arrest, on the one hand, and either a heart problem or persisting change in personality, on the other, the jury found such a causal connection to emotional distress on March 3, 1981 and in the immediate aftermath. There was abundant evidence that plaintiff did suffer such temporary

emotional distress. It is the kind of causal connection which jurors are competent to assess without the aid of expert testimony.

Supreme Court, U.S.
FILED
MAR 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

85-1531

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

MARCUS GUMZ,

Petitioner,

v.

DOUGLAS MORRISSETTE and
LAWRENCE CLOUTIER,

Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRONSON C. LA FOLLETTE
Attorney General

JOHN R. SWEENEY
Assistant Attorney General

Counsel of Record

Attorneys for Respondent

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7342

15pp

TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

STATEMENT OF THE FACTS.....3

ARGUMENT.....5

PETITIONER HAS FAILED TO DEMONSTRATE THAT THIS COURT SHOULD GRANT A WRIT OF CERTIORARI.....5

I. No Conflict Exists Among The Circuits On The Excessive Force Issue.....5

A. Conway I & II.....5

B. Petitioner misinterprets the opinion of the Seventh Circuit Court of Appeals in this case.....6

II. Petitioner's Challenge To The Application Of Hudson v. Palmer Is Without Merit.....9

CONCLUSION.....11

CASES CITED

Bonner v. Coughlin,
517 F.2d 1311 (7th Cir. 1975),
modified en banc,
545 F.2d 565 (1976),
cert. denied, 435 U.S.
932 (1978).....10-11

Cerbone v. Conway,
No. 84-1947, cert. granted,
54 U.S.L.W. 3492
(Jan. 27, 1986),.....6

Conway v. Village of Mount Kisco,
750 F.2d 205 (2nd Cir. 1984)....5, 6

Conway v. Village of Mount Kisco,
758 F.2d 46 (2nd Cir. 1985).....5, 6

Duncan v. Nelson,
466 F.2d 939 (7th Cir.),
cert. denied,
409 U.S. 894 (1972).....8

Hudson v. Palmer,
104 S. Ct. 3194 (1984)..3, 9, 10, 11

Parratt v. Taylor,
451 U.S. 527 (1981).....10, 11

Williamson Co. Regional Planning v.
Hamilton Bank,
105 S. Ct. 3108 (1985).....10

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment.....10

OTHER AUTHORITIES

42 U.S.C. § 1983.....2, 11

S.C.R. 17.1(c).....6

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

MARCUS GUMZ,

Petitioner,

v.

DOUGLAS MORRISSETTE and
LAWRENCE CLOUTIER,

Respondents.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

This is a civil rights action in which the petitioner alleged that eleven defendants, including officials and employes of the Wisconsin Department of Natural Resources ("DNR"), violated his constitutional right to due process

pursuant to 42 U.S.C. § 1983 (App. 1). The district court entered judgment on the jury verdict which found liability against only two individuals on a single issue; the jury found that two defendants had used excessive force in arresting the plaintiff (App. 1, 6).

All post-trial motions were denied by the court, including the plaintiff's motion to amend the judgment to include liability for the seizure of the plaintiff's dragline (App. 1-2, 6-7).

The Seventh Circuit Court of Appeals reversed the judgment of the district court on excessive force in the arrest but affirmed the district court's denial of liability for the seizure of the dragline. Costs were awarded to the defendants by both the appellate and district courts.

The petitioner advances two arguments which he suggests support granting a Writ of Certiorari.

1. The Seventh Circuit Court of Appeals erred in reversing the district court's judgment finding that two defendants violated the plaintiff's constitutional rights by using excessive force in arresting the plaintiff.

2. The Seventh Circuit Court of Appeals erred in its application of Hudson v. Palmer, 104 S. Ct. 3194 (1984).

STATEMENT OF THE FACTS

The Court of Appeals has already set forth a rather concise statement of the facts relevant to the legal issues in question (App. 1-7). Petitioner's brief reiterates those facts for approximately two paragraphs but then radically deviates and detours therefrom into the

highway of speculation, argument and narration of facts unsupported by and in conflict with the record in both the district and the appellate court.

Rather than point out the numerous misstatements, argument and speculation in petitioner's statement of facts, the respondents simply reiterate those facts discussed by the appellate court in its opinion (App. 1-7).[1/]

1/ Besides misleading the court by his misstatement of the facts, the petitioner's Statement of the Case and issues presented are seriously deficient and inaccurate because they are founded on facts not supported by the record below (see App. 1-2).

ARGUMENT

PETITIONER HAS FAILED TO DEMONSTRATE THAT THIS COURT SHOULD GRANT A WRIT OF CERTIORARI.

I. No Conflict Exists Among The Circuits On The Excessive Force Issue.

A. Conway I & II

The petitioner suggests that the portion of the decision of the Seventh Circuit Court of Appeals related to the use of excessive force conflicts with two decisions from the second circuit, Conway v. Village of Mount Kisco, 750 F.2d 205 (2nd Cir. 1984) and Conway v. Village of Mount Kisco, 758 F.2d 46 (2nd Cir. 1985), which have been accepted for review by this Court.

As this Court is aware, the two Conway cases are malicious prosecution cases and the underlying facts cannot in any sense be compared with the portion of this case related to the alleged use of

excessive force. See Cerbone v. Conway, No. 84-1947, cert. granted, 54 U.S.L.W. 3492 (Jan. 27, 1986).

Thus, the Conway cases as discussed by petitioner do not form the basis for granting the writ for certiorari pursuant to S.C.R. 17.1(c).

B. Petitioner misinterprets the opinion of the Seventh Circuit Court of Appeals in this case.

The petitioner suggests that the Seventh Circuit "has required as an essential element of a substantive due process claim proof of severe injury" (Petitioner's Brief at 15); further,"that emotional distress injury, in the absence of physical injuries, absent extraordinary circumstances is insufficient to constitute a constitutional violation as a matter of law (Petitioner's Brief at

16). This, very frankly, is not so and the Seventh Circuit took the time to say so.

Petitioner apparently would like the Court to ignore the Seventh Circuit's very explicit language to the contrary:

> This Court is not holding that some type of bodily injury is an absolute requirement to § 1983 liability based on an excessive force claim. But the ultimate question here is, after all, whether the use of force was so egregious as to be constitutionally excessive, and the presence of some physical injury is certainly relevant to that determination.
>
> ... Although defendants here must have known that their operation would upset and anger the plaintiff, the facts of this case as determined by the judge and jury do not implicate the type of "brutal and demeaning" attack on the psyche

> of Marcus Gumz which would be actionable under § 1983.[4] 2/

(App. 12.)

Petitioner's reading of the opinion of the court of appeals is in error.

2/ In footnote 4, the Seventh Circuit reiterated its statement that actual physical violence is not a sine qua non of § 1983 liability based on an excessive force claim.

> Duncan v. Nelson, 466 F.2d 939, 945 (7th Cir. 1972), certiorari denied, 409 U.S. 894, 93 S. Ct. 116, 175, 34 L. Ed. 2d 152, which held that "physical violence need [not] be present to produce the coercion necessary to constitute an involuntary confession cognizable under § 1983," is not contrary to our holding today. While the presence or threat of physical violence is indeed of limited relevance to determining whether psychological coercion rendered a confession involuntary, the absence of such violence or of any resulting physical injury is most relevant to the inquiry of whether the use of force by state officials is so excessive as to shock the conscience of the court.

II. Petitioner's Challenge To The Application Of Hudson v. Palmer Is Without Merit.

Petitioner contends that the Court of Appeals in this case for the first time extended this Court's ruling in Hudson v. Palmer, 104 S. Ct. 3194, and by doing so decided an important question of federal law which should be settled by this Court (Petitioner's Brief, p. 34).

Initially it must be reiterated that the petitioner's effort to create an issue for appeal to this Court is clouded by his misstatements of the facts.

Secondly, it is clear that petitioner neither understands the decision of the Court of Appeals in this case nor the constitutional notion of a "taking" as defined by this Court.

The Court of Appeals held "[I]t is also clear that the deprivation [the

seizure of the dragline] was the result of a random and unauthorized act of a state official" (App. 15). And, because the Court found the State of Wisconsin did provide the plaintiff with a meaningful post-deprivation remedy to redress the taking of his property, no violation of the Fourteenth Amendment rights occurred (App. 15-16).

Furthermore, this Court has repeatedly held that there is no constitutional deprivation until such time as the state fails to provide an adequate post-deprivation remedy for the loss, Williamson Co. Regional Planning v. Hamilton Bank, 105 S. Ct. 3108, 3121 (1985); Hudson v. Palmer, 104 S. Ct. at 3204; Parratt v. Taylor, 451 U.S. 527, 541-542 (1981); Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975) modified en

banc, 545 F.2d 565 (1976), cert. denied, 435 U.S. 932 (1978).

The petitioner's attempt to distinguish the Court of Appeals' application of Hudson v. Palmer is without any authority.

In this case, there was no taking in the constitutional sense and the petitioner had a remedy under state law for whatever relief he might have sought. Besides the fact that he did not pursue these remedies even though they were clearly adequate, there is no constitutional requirement that state remedies must provide all the relief which might have been available under 42 U.S.C. § 1983. Parratt v. Taylor, 451 U.S. at 544. Petitioner's argument to the contrary is without merit.

CONCLUSION

This petition does not present either a conflict among the circuits or an important federal question which must be decided by this Court. Thus, the petition should be denied.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General

JOHN R. SWEENEY
Assistant Attorney General

Counsel of Record

Attorneys for Respondent

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7342